STATE OF MICHIGAN

COURT OF APPEALS

DAVID L. MORDEN and DEBRA M. MORDEN, Individually and as Next Friend of DAVID M. MORDEN, CRAIG M. MORDEN and STACIE M. MORDEN, Minors,

Plaintiffs-Appellants,

v

CHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
January 30, 1998

No. 198381
Wayne Circuit Court
LC No. 96-619024-NP

Before: McDonald, P.J. and Wahls and J.R. Weber*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(3) (insufficient service of process). We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted where "[t]he service of process was insufficient." MCR 2.116(C)(3). The affidavits, together with any other documentary evidence submitted by the parties must be considered by the trial court. MCR 2.116(G)(5). All factual disputes for the purpose of deciding the motion are resolved in favor of the nonmoving party. See *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995); *William Moors, Inc v Pine Lake Shopping Center #1*, 74 Mich App 12; 253 NW2d 658 (1977).

In this case, service of process was accomplished by leaving the summons and a copy of the complaint with Mike Blair, an employee at defendant's payroll office in Centerline. Service of process upon private corporations is governed by MCR 2.105(D). Because Blair was not defendant's resident agent or an officer, the manner of service failed to comply with MCR 2.105(D)(1). Likewise, it is undisputed that Blair was not a director or trustee, nor is any claim made that Blair was in charge of an office, and no attempt was made to serve defendant by registered mail. Therefore, the manner of

* Circuit judge, sitting on the Court of Appeals by assignment.

service also failed to comply with MCR 2.105(D)(2). Finally, neither MCR 2.105(D)(3) or (4) are applicable in this case. Accordingly, the trial court properly concluded that plaintiffs failed to comply with any of the alternative methods of service set forth in MCR 2.105(D).

However, the trial court's ruling fails to reflect consideration of MCR 2.105(J), which states:

> (J) Jurisdiction; Range of Service; Effect of Improper Service.
>
> (1) Provisions for service of process contained in these rules are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances. . . .
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> * * *
>
> (3) *An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.* [Emphasis added.]

MCR 2.105(J) is a mandatory rule. *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986). Thus, if a defendant actually receives a copy of the summons and complaint within the time permitted by the court rules, the defendant cannot have the action dismissed on the ground that the manner of service contravened the rules. *Id.*; *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 674; 413 NW2d 474 (1987). The phrase "time provided in these rules" refers to the life of the summons. *Hill*, *supra* at 613. Moreover, it appears that a defendant will not be deemed to have actual notice of an action unless a "person with authority to act for defendant . . . ha[s] knowledge of the lawsuit[.]" *Tucker v Eaton*, 426 Mich 179, 189; 393 NW2d 827 (1986).

We conclude that summary disposition was improperly granted in this case because a question of facts exists as to whether defendant received timely notice of plaintiffs' action. It is undisputed that defendant received, at some point, actual notice of plaintiffs' lawsuit, as well as a copy of the summons and complaint. However, it is unclear from the existing record whether defendant received notice of the lawsuit "within the time provided in [the court] rules for service." MCR 2.105(J)(3). The summons expired on June 26, 1996. Although defendant's affidavit states that the "Office of General Counsel did not receive the Summons and Complaint until July 2, 1996," it does not indicate that notice of the lawsuit was not received by "a person with authority to act for defendant" before June 26, 1996. *Tucker*, *supra* at 189. Furthermore, it is apparent from the record that defendant received notice of plaintiffs' lawsuit in response to the service of the summons and complaint on Mike Blair. However, plaintiffs' affidavit states that Blair was served with these documents on June 17, 1996, and that Blair indicated that he would forward the documents by inter-department mail. No evidence was submitted explaining the apparent delay in transmitting the documents, explaining the location of the documents between June 17 and June 26, or explaining who may have had possession of the documents during this period.

A question of fact also exists concerning Mike Blair's authority with respect to acceptance of the summons and complaint, and whether plaintiffs' process server was led to believe that valid

service was accomplished by leaving the summons and complaint with Blair. In *Dogan v Michigan Basic Property Ins Ass'n*, 130 Mich App 313, 317-318; 343 NW2d 532 (1983), the process server, upon executing service of process on the defendant, was told by a receptionist that they have a "person designated to accept such service" and was directed to Sharon Smith, who was then served with the summons and complaint. Although Smith allegedly was not one of the persons designated to receive service of process, this Court held that the defendant was estopped from raising the defense of improper service:

> In *Wilson v California Wine Co*, 95 Mich 117; 54 NW 643 (1893), wherein plaintiff's process server was directed by an officer of defendant company to serve another individual, by stating that the individual was the person to be served with the summons, and this evidence was uncontradicted, the Michigan Supreme Court held that defendants were estopped from denying that service was proper under the circumstances.
>
> In the present case, we find that *Wilson, supra*, is applicable. Thus, we find that the defendant is estopped from raising the defense of improper service due to its representation to plaintiff's process server that valid service was accomplished by leaving the summons and copy of the complaint with its clerk, Sharon Smith. Plaintiff has presented sufficient evidence to sustain a conclusion that the defendant caused the plaintiff to detrimentally rely upon the validity of the service. *Dogan, supra* at 318.

In *Tucker*, the Supreme Court held that a case of estoppel is not made out unless there is detrimental reliance, i.e., "[an] indication that [the] plaintiff was misled by [a] representation or concealment of fact by [the] defendant." *Id.* at 185, 188.

In this case, plaintiffs' affidavit states that Mike Blair informed the process server that he would "find out" where the documents should go and that, after making a telephone call, Blair told the process server that he could accept the documents and send them to their proper location. The exact circumstances surrounding the alleged telephone call, including whether a telephone call actually was made, are disputed.[1] Nonetheless, we believe that plaintiffs' affidavit alleges sufficient facts which, if proven, could give rise to a conclusion that defendant caused plaintiffs to detrimentally rely upon the validity of service, thereby estopping defendant from raising the defense of improper service.

In light of the foregoing, we conclude that summary disposition was improperly granted in this case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber

[1] At the hearing on defendant's motion for summary disposition, defense counsel stated:

> Mr. Blair didn't make a phone call. I haven't spoken with Mr. Blair, but someone from my office spoke with Mr. Blair. Mr. Blair didn't make a phone [call] to determine whether he could accept service [of] process.